

Kristin Henry (State Bar No. 220908)
Sierra Club Environmental Law Program
85 Second Street, Second Floor
San Francisco, CA 94105
(415) 977-5716
(415) 977-5793 FAX
kristin.henry@sierraclub.org

E-filing

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SIERRA CLUB and WILDEARTH
GUARDIANS,

Plaintiffs,

vs.

LISA P. JACKSON, in her official capacity as
Administrator, United States Environmental
Protection Agency,

Defendant

Case No.:

CV 10 4060

**COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF**

1. Plaintiffs SIERRA CLUB and WILDEARTH GUARDIANS bring this Clean Air Act citizen enforcement action to compel the United States Environmental Protection Agency ("EPA") to undertake long-overdue nondiscretionary duties. Specifically, Sierra Club challenges the failure of Defendant, LISA P. JACKSON, in her official capacity as Administrator of the EPA to perform certain mandatory duties required by the Clean Air Act, 42 U.S.C. §§ 7401-7671q (2010), including the failure to: [1] promulgate Federal Implementation Plans pursuant to

42 U.S.C. § 7410(c)(1) (2010) and [2] take final action on State Implementation Plan submittals within 12 months as required by 42 U.S.C. § 7410(k)(2) (2010).

JURISDICTION, VENUE AND NOTICE

2. This action is brought pursuant to the Clean Air Act, 42 §7410 *et seq.* Thus, this Court has subject matter jurisdiction over the claims set forth in this Complaint pursuant to 42 U.S.C. §7604(a) (2010). This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1331 (2010) (federal question). An actual controversy exists between the parties. This case does not concern federal taxes, is not a proceeding under 11 U.S.C. §§ 505 or 1146 (2010), and does not involve the Tariff Act of 1930. This Court has authority to order the declaratory relief requested under 28 U.S.C. §2201 (2010). If the Court orders declaratory relief, 28 U.S.C. §2202 authorizes this Court to issue injunctive relief.

3. **Intradistrict Assignment.** U.S. EPA Region 9 is headquartered in San Francisco. U.S. EPA Region 9 includes Arizona, Hawaii, Guam, America Samoa and the Northern Mariana Islands. Thus, a substantial part of the alleged events or omissions giving rise to Plaintiffs' claims occurred in the Northern District of California. Venue is therefore proper in this Court pursuant to 28 U.S.C. §1391(e) (2010).

4. On June 22, 2010, Plaintiffs mailed a sixty-day notice of intent to sue letter via certified mail, return receipt requested to Defendant Lisa P. Jackson. The notice letter stated that Plaintiffs intended to sue Defendant for failure to: [1] promulgate Federal Implementation Plans under 42 U.S.C. § 7410(c)(1) (2010) for the 1997 8-hour ozone NAAQS for nine states¹ – North Dakota, Hawaii, Guam, American Samoa, Northern Mariana Islands, Alaska, Idaho, Oregon and

¹ The term "state" is used in this complaint as it is defined in the Clean Air Act, 42 U.S.C. § 7602(d) (2010).

1 Washington; [2] promulgate Federal Implementation Plans under 42 U.S.C. § 7410(c)(1) (2010)
2 to address certain elements required by 42 U.S.C. § 7410(a)(2) (2010) for Maryland, Virginia,
3 Arkansas, New Mexico, Oklahoma, Arizona, Florida and Georgia; [3] take final action on
4 provisions of the 1997 8-hour ozone Infrastructure SIP submittals for Maryland, Virginia,
5 Delaware, Arkansas, New Mexico, Oklahoma, Florida, Georgia, Tennessee, Washington, D.C.
6 and West Virginia and [4] take final action on 1997 8-hour Infrastructure SIP submittals for
7 Texas, Nevada and North Carolina. Defendant received the sixty day notice of intent to sue letter
8 no later than June 28, 2010.
9

10
11 5. More than 60 days have passed since Defendant received Plaintiffs' notice of
12 intent to sue letter. To date, Defendant has not remedied the violations alleged in the Notice
13 Letter and again set forth in this Complaint. Therefore, an actual controversy exists between the
14 parties.
15

16 PARTIES

17 6. Plaintiff **SIERRA CLUB** brings this action on behalf of itself and its adversely
18 impacted members. Sierra Club, founded in 1892, is a nonprofit public-benefit corporation
19 organized and existing under the laws of California with more than 600,000 members in the
20 United States and with one or more chapters in every state. The Sierra Club's purposes include
21 "to practice and promote responsible use of the earth's ecosystem and resources; to enlist and to
22 educate humanity to protect and restore the quality of the natural and human environment, and to
23 use all lawful means to carry out these objectives." Sierra Club activities include hiking,
24 canoeing, caving, swimming, fishing, nature study, and advocacy for the improvement and
25 protection of water quality and air quality across the country.
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1 7. Plaintiff **WILDEARTH GUARDIANS** (“Guardians”) brings this action on
2 behalf of itself and its adversely impacted members. Guardians is a non-profit organization
3 dedicated to protecting and restoring wildlife, wild rivers, and wild places in the American West.
4 Guardians currently has four programmatic areas of focus - wildlife, wild places, wild rivers, and
5 climate and energy. The organization has over 4,500 members.
6

7 8. Sierra Club and Guardians members live, work, raise families, recreate and
8 engage in economic and other activities in and around North Dakota, Hawaii, Guam, American
9 Samoa, Northern Mariana Islands, Alaska, Idaho, Oregon, Washington, Maryland, Virginia,
10 Arkansas, New Mexico, Oklahoma, Arizona, Florida, Georgia, Delaware, Arkansas, Tennessee,
11 West Virginia, Texas, Nevada, North Carolina and Washington, D.C. They are adversely
12 affected by exposure to ozone. The adverse effects of such pollution include actual and/or
13 threatened harm to their health, their families’ health, their professional well being, their
14 educational and economic interests, and their aesthetic and recreational enjoyment of the
15 environment in these areas.
16
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18 9. The Clean Air Act violations alleged in this Complaint also deprive Sierra Club,
19 Guardians and their members of certain procedural rights, including notice and opportunity to
20 comment, associated with EPA’s failure to perform certain mandatory duties: failure to
21 promulgate Federal Implementation Plans and failure to take final action on Infrastructure SIP
22 submittals. The Clean Air Act violations alleged in this Complaint also deprive Sierra Club,
23 Guardians and their members of certain information including but not limited to ambient
24 monitoring data gathered in accordance with applicable regulations, public notice of exceedances
25 of National Ambient Air Quality Standards and emission inventories.
26
27
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1 10. Because Defendant has not (1) promulgated Infrastructure Federal
2 Implementation Plans to address the 1997 8-hour ozone NAAQS for certain states and (2) taken
3 final action on 1997 8-hour ozone Infrastructure SIP submittals for certain states by the
4 applicable deadlines, Sierra Club, Guardians and their members cannot be certain that the 1997
5 8-hour ozone NAAQS for the affected states conforms with the requirements of the Clean Air
6 Act. Similarly, Defendant's failure to promulgate Federal Implementation Plans and to take final
7 action on SIP submittals prevents Sierra Club and WildEarth Guardians' members from being
8 certain that they are protected by the 1997 8-hour ozone NAAQS.
9

10
11 11. The Clean Air Act violations alleged in this Complaint have injured and will
12 continue to injure the interests of Plaintiffs' organizations and their members, unless and until this
13 Court grants the requested relief. Granting the relief requested in this lawsuit would address these
14 injuries by compelling EPA action to perform its mandatory duties, thereby improving air quality
15 and reducing the risk of exposure to air pollution and the uncertainty regarding that exposure.
16

17 12. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ("EPA") is
18 the federal agency charged with implementation and enforcement of the Clean Air Act. As
19 described below, the Clean Air Act assigns to EPA certain non-discretionary duties. In this case,
20 EPA has failed to perform certain non-discretionary duties.
21

22 13. Defendant **LISA P. JACKSON** is sued in her official capacity as the
23 Administrator of the EPA. She is charged in that role with taking various actions to implement
24 and enforce the Clean Air Act, including the requirement to promulgate Infrastructure Federal
25 Implementation Plans for the 1997 8-hour ozone NAAQS for certain states and to take final
26 action on 1997 8-hour ozone Infrastructure SIP submittals for certain states.
27
28

STATUTORY FRAMEWORK

14. The Clean Air Act aims “to protect and enhance the quality of the Nation’s air resources.” 42 U.S.C. § 7401(b)(1) (2010). Congress intended the Clean Air Act in part to “speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again.” H.R. Rep. No. 91-1146, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356, 5356.

15. In order to achieve this goal, the Clean Air Act, including the 1990 amendments, establishes a partnership between EPA and the states for attainment and maintenance of national air quality goals. *See* 42 U.S.C. § 7401-7515 (2010).

16. Pursuant to the Clean Air Act, EPA sets NAAQS to limit levels of “criteria pollutants,” including carbon monoxide, lead, nitrogen dioxide, particulate matter, ozone, and sulfur dioxide. *See* 40 C.F.R. part 50.4-50.13 (2010).

17. The NAAQS are designed to protect the public from being exposed to levels of air pollutants that EPA has found to have significant adverse health and welfare impacts.

18. The Clean Air Act requires all areas of the country to meet NAAQS. 42 U.S.C. §§ 7409-7410 (2010).

19. In order to achieve this goal, states, or regions within a state, must adopt a pollution control plan, known as a State Implementation Plan (“SIP”), that contains enforceable emissions limitations necessary to attain the NAAQS and meet applicable requirements of the Clean Air Act, including ensuring attainment, maintenance and enforcement of NAAQS. 42 U.S.C. §§ 7410(a)(1) (2010), (a)(2)(A) (2010); § 7401(a)(1),(k) (2010).

20. Pursuant to the Clean Air Act states are required to submit SIPs that provide for the “implementation, maintenance and enforcement” of any new or revised NAAQS within three

1 years of a NAAQS' promulgation. 42 U.S.C. § 7410(a)(1) (2010). EPA is then required to make
2 a finding as to whether a SIP submittal administratively complies with the requirements of 42
3 U.S.C. § 7410(a)(2) (2010) within six months of the submittal; a determination known as the
4 completeness finding. 42 U.S.C. §7410(k)(1)(B) (2010).

5
6 21. If EPA determines that a state has failed to submit a complete SIP, that
7 determination triggers a 24-month period after which EPA has a mandatory duty to step in and
8 promulgate a Federal Implementation Plan. 42 U.S.C. §7410(c)(1) (2010).

9
10 22. In situations where states make a SIP submittal and EPA either does not make (1)
11 a completeness finding or (2) a finding that the submittal failed to meet the minimum criteria, the
12 submittal is deemed administratively complete by operation of law six months after the
13 submittal. 42 U.S.C. §7410(k)(1)(B) (2010).

14
15 23. Once a submittal is deemed complete, either by operation of law or a
16 completeness finding, EPA has a mandatory duty to take final action on the submittal within
17 twelve (12) months by approving it in full, disapproving it in full or approving part of it and
18 disapproving part of it. 42 U.S.C. § 7410(k)(2) (2010).

19 STATEMENT OF FACTS

20
21 24. EPA has failed to perform certain mandatory duties required by the Clean Air
22 Act, including the failure to: [1] promulgate Federal Implementation Plans pursuant to 42 U.S.C.
23 § 7410(c)(1) (2010) for part or all of 17 states within twenty-four (24) months after it issued a
24 finding of failure to submit all or part of the 42 U.S.C. § 7410(a) (2010) ("Infrastructure") SIP
25 requirements for the 1997 8-hour ozone NAAQS and [2] take final action on State
26 Implementation Plan submittals as required by 42 U.S.C. § 7410(k)(2) (2010) for 14 states
27 within 12 months after these submittals were found or deemed complete.
28

25. On July 18, 1997, EPA promulgated an 8-hour NAAQS for ozone. 62 Fed. Reg. 38856 (July 18, 1997).

26. In 2008, EPA issued a determination as to whether each state had submitted a complete 1997 8-hour Infrastructure SIP. 73 Fed. Reg. 16205 (March 27, 2008). While EPA determined that certain states did submit a complete Infrastructure SIP, it also determined that numerous states either did not submit Infrastructure SIPs, or failed to submit certain elements that were required as part of the Infrastructure SIP, thereby triggering the twenty-four (24) month period after which EPA must promulgate a Federal Implementation Plan to address the deficiencies. 73 Fed. Reg. 16205 (March 27, 2008).

Failure to Promulgate Federal Implementation Plans
Pursuant to 42 U.S.C. § 7410(c)(1)

27. EPA has failed to promulgate Federal Implementation Plans pursuant to 42 U.S.C. §7410(c)(1) (2010) to address the 42 U.S. §7410(a) (2010) Infrastructure SIP for the 1997 8-hour ozone NAAQS within two years after it issued a finding of failure to submit for nine states: North Dakota, Hawaii, Guam, American Samoa, Northern Mariana Islands, Alaska, Idaho, Oregon and Washington.

North Dakota, Hawaii, Guam, American Samoa, Northern Mariana Islands, Alaska, Idaho, Oregon and Washington

28. On March 27, 2008, EPA found that the following states and territories “failed to make a complete (Infrastructure SIP) submittal to satisfy the requirements of [42 U.S.C. § 7410(a)(2) (2010)]” for the 1997 8-hour ozone NAAQS by the applicable date: North Dakota, Hawaii, Guam, American Samoa, Northern Mariana Islands, Alaska, Idaho, Oregon and Washington. 73 Fed. Reg. 16205, 16207 (March 27, 2008). The effective date of this finding was April 28, 2008. *Id.*

1 29. It has now been over two years since EPA made its finding. Since this finding, EPA
2 has not approved a 1997 8-hour ozone Infrastructure SIP that meets the requirements of 42
3 U.S.C. § 7410(a)(2) (2010) for any of these areas.

4
5 30. Pursuant to the Clean Air Act, EPA was required to promulgate Federal
6 Implementation Plans for the 1997 8-hour ozone NAAQS for North Dakota, Hawaii, Guam,
7 American Samoa, Northern Mariana Islands, Alaska, Idaho, Oregon and Washington upon the
8 expiration of the two year period, that is by April 28, 2010. EPA has failed to do so, in violation
9 of its mandatory duty.

10
11 31. Similarly, EPA has failed to promulgate Federal Implementation Plans for eight
12 states that failed to submit certain elements of the Infrastructure SIP for 1997 8-hour ozone
13 NAAQs required by 42 U.S.C. §7410(a)(2) (2010): Maryland, Virginia, Arkansas, New Mexico,
14 Oklahoma, Arizona, Florida and Georgia.

15
16 **Maryland, Virginia, Arkansas, New Mexico and Oklahoma**

17 32. On March 27, 2008, EPA found that Maryland, Virginia, Arkansas, New Mexico
18 and Oklahoma “failed to submit a [SIP] addressing changes to [their] part C [Prevention of
19 Significant Deterioration] permit program required by the November 29, 2005 ...final rule that
20 made NOx a precursor for ozone” by the applicable date as required to do so by 42 U.S.C. §§
21 7410(a)(2)(C) and (J) (2010). 73 Fed. Reg. 16205, 16207-08 (March 27, 2008). The effective
22 date for this finding is April 28, 2008. *Id.*

23
24 33. It has now been over two years since EPA made its finding. Since this finding,
25 EPA has not approved an Infrastructure SIP that meets the requirements of 42 U.S.C. §
26 7410(a)(2)(C) and (J) (2010) for any of these areas. EPA has proposed to approve a change to
27 the New Mexico SIP, 75 Fed. Reg. 52693 (Aug. 27, 2010) but a proposal does not alleviate
28

1 EPA's mandatory duty. *See* 42 U.S.C. § 7410(c)(1) (2010) (emphasis added) (“ . . . unless the
2 State corrects the deficiency **and** the Administrator **approves** the plan or plan revision[.]”).

3
4 34. Pursuant to the Clean Air Act, EPA was required to promulgate Federal
5 Implementation Plans to address these Infrastructure SIP requirements for Maryland, Virginia,
6 Arkansas, New Mexico and Oklahoma upon the expiration of the two year period, that is by
7 April 28, 2010. EPA has failed to do so, in violation of its mandatory duty.

8 **Arizona**

9
10 35. On March 27, 2008, EPA found that Arizona “failed to make a complete
11 submittal to satisfy the requirements of [42 U.S.C. § 7410(a)(2) (2010)]” for the 1997 8-hour
12 ozone NAAQS by the applicable date. 73 Fed. Reg. 16205, 16208 (March 27, 2008). The
13 effective date of this finding was April 28, 2008. *Id.*

14
15 36. Since this finding, Arizona submitted an Infrastructure SIP for all elements except
16 42 U.S.C. § 7410(a)(2)(G) (2010). It has now been over two years since EPA made its finding.

17
18 37. Pursuant to the Clean Air Act, EPA was required to promulgate a Federal
19 Implementation Plan addressing this Infrastructure SIP requirement for Arizona upon the
20 expiration of the two year period, that is by April 28, 2010. EPA has failed to do so, in violation
21 of its mandatory duty.

22 **Florida and Georgia**

23
24 38. On March 27, 2008, EPA found both Florida and Georgia “failed to submit a SIP
25 addressing the emergency episode plan requirement of [42 U.S.C. § 7410(a)(2)(G) (2010)].” 73
26 Fed. Reg. 16205 (March 27, 2008). The effective date of this finding was April 28, 2008. *Id.*
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28

39. Since this finding, EPA has not approved an Infrastructure SIP for either Florida or Georgia addressing this requirement. It has now been over two years since EPA made its finding.

40. Pursuant to the Clean Air Act, EPA was required to promulgate Federal Implementation Plans addressing this Infrastructure SIP requirement for both Florida and Georgia upon the expiration of the two year period, which is by April 28, 2010. EPA has failed to do so, in violation of its mandatory duty.

Failure to Take Final Action on State Implementation Plan Submittals Pursuant to 42 U.S.C. § 7410(k)(2)

Maryland, Virginia, Delaware, Arkansas, New Mexico and Oklahoma:

41. EPA has failed to take final action on provisions of the 1997 8-hour ozone Infrastructure SIP submittals for Maryland, Virginia, Delaware, Arkansas, New Mexico and Oklahoma and publish notice of its action.

42. As previously set forth, on March 27, 2008, EPA made a completeness finding for all elements of the Infrastructure SIP submittals for these six states except as it pertains to the requirements of 42 U.S.C. § 7410(a)(2)(C) and (J) (2010). 73 Fed. Reg. at 16207-08 (the elements for which EPA did not find a failure to submit are deemed complete under 42 U.S.C. § 7410(k)(1)(B) (2010)). The effective date of this finding was April 28, 2008. *Id.*

43. Pursuant to 42 U.S.C. § 7410(k)(2) (2010), EPA was required to take final action by approving in full, disapproving in full, or approving in part and disapproving in part all elements of the Infrastructure SIP submittals except the requirements of 42 U.S.C. §§ 7410(a)(2)(C) and (J) (2010) for these states within 12 months of its completeness finding on these submittals or by April 28, 2009. 42 U.S.C. § 7410(k)(2) (2010). EPA has failed to do so, in violation of its mandatory duty.

Florida and Georgia:

44. EPA has failed to take final action on provisions of the 1997 8-hour ozone Infrastructure SIP submittals for Florida and Georgia.

45. As previously set forth, on March 27, 2008, EPA made a completeness finding for all elements of the Infrastructure SIP submittals for Florida and Georgia except as it pertains to the requirements of 42 U.S.C. §7410(a)(2)(G) (2010). 73 Fed. Reg. at 16208 (the elements for which EPA did not find a failure to submit are deemed complete under 42 U.S.C. §7410(k)(1)(B) (2010)). The effective date of this finding was April 28, 2008. *Id.*

46. Pursuant to U.S.C. § 7410(k)(2) (2010), EPA was required to take final action by approving in full, disapproving in full, or approving in part and disapproving in part all elements of the Florida and Georgia Infrastructure SIP submittals except the requirements of 42 U.S.C. §7410(a)(2)(G) (2010) within 12 months of its completeness finding on these submittals which is by April 28, 2009. 42 U.S.C. § 7410(k)(2) (2010). EPA has failed to do so, in violation of its mandatory duty.

Texas:

47. EPA has failed to take final action on the 1997 8-hour ozone Infrastructure SIP submittal for Texas.

48. Texas submitted its 1997 8-hour ozone Infrastructure SIP on April 4, 2008. Pursuant to 42 U.S.C. §7410(k)(1)(B) (2010), the submittal was deemed complete by no later than October 4, 2008.

49. Pursuant to 42 U.S.C. § 7410(k)(2) (2010), EPA was required to take final action on Texas' 1997 8-hour ozone Infrastructure SIP by approving in full, disapproving in full, or approving in part and disapproving in part within 12 months of Texas' 1997 8-hour ozone

1 Infrastructure SIP being deemed complete which is by October 4, 2009. 42 U.S.C. § 7410(k)(2)
2 (2010). EPA has failed to do so, in violation of its mandatory duty.

3 **Nevada:**

4
5 50. EPA has failed to take final action on the 1997 8-hour ozone Infrastructure SIP
6 submittal for Nevada.

7 51. Nevada submitted its 1997 8-hour ozone Infrastructure SIP on February 1, 2008.
8 Pursuant to 42 U.S.C. §7410(k)(1)(B) (2010), the submittal was deemed complete by no later
9 than August 1, 2008.

10
11 52. Pursuant to 42 U.S.C. § 7410(k)(2) (2010), EPA was required to take final action
12 on Nevada's 1997 8-hour ozone Infrastructure SIP by approving in full, disapproving in full, or
13 approving in part and disapproving in part within 12 months of Nevada's 1997 8-hour ozone
14 Infrastructure SIP being deemed complete which is by August 1, 2009. 42 U.S.C. § 7410(k)(2)
15 (2010). EPA has failed to do so, in violation of its mandatory duty.

16
17 **North Carolina:**

18 53. EPA has failed to take final action on the 1997 8-hour ozone Infrastructure SIP
19 submittal for North Carolina.

20
21 54. On March 27, 2008, EPA made a completeness finding for all elements of the
22 Infrastructure SIP submittal for North Carolina except as it pertains to the requirements of 42
23 U.S.C. §7410(a)(2)(C) and (J) (2010). 73 Fed. Reg. at 16208 (the elements for which EPA did
24 not find a failure to submit are deemed complete under 42 U.S.C. §7410(k)(1)(B) (2010)). The
25 effective date of this finding was April 28, 2008. *Id.*

26
27 55. Pursuant to 42 U.S.C. § 7410(k)(2) (2010), EPA was required to take final action
28 by approving in full, disapproving in full, or approving in part and disapproving in part all

1 elements of North Carolina's Infrastructure SIP submittal except the requirements of 42 U.S.C.
2 §7410(a)(2)(C) and (J) (2010) within 12 months of its completeness finding on North Carolina's
3 submittal which is by April 28, 2009. 42 U.S.C. § 7410(k)(2) (2010). EPA has failed to do so,
4 in violation of its mandatory duty.
5

6 56. Since EPA's finding, North Carolina made a submittal addressing the 42 U.S.C.
7 §7410(a)(2)(C) and (J) (2010) requirements which EPA deemed complete as of July 20, 2008.
8

9 57. Pursuant to CAA 42 U.S.C. § 7410(k)(2) (2010), EPA was required to take final
10 action by approving in full, disapproving in full, or approving in part and disapproving in part
11 these elements of North Carolina's Infrastructure SIP submittal within 12 months of the
12 completeness finding on North Carolina's submittal or by July 20, 2009. 42 U.S.C. § 7410(k)(2)
13 (2010). EPA has failed to do so, in violation of its mandatory duty.
14

15 **Tennessee:**

16 58. EPA has failed to take final action on provisions of the 1997 8-hour ozone
17 Infrastructure SIP submittal for Tennessee.

18 59. On March 27, 2008, EPA made a completeness finding for all elements of the
19 Infrastructure SIP submittal for Tennessee except as it pertains to the requirements of 42 U.S.C.
20 §7410(a)(2)(C) and (J) (2010). 73 Fed. Reg. at 16208 (the elements for which EPA did not find
21 a failure to submit are deemed complete under 42 U.S.C. §7410(k)(1)(B) (2010)). The effective
22 date of this finding was April 28, 2008. *Id.*
23

24 60. Pursuant to 42 U.S.C. § 7410(k)(2) (2010), EPA was required to take final action
25 by approving in full, disapproving in full, or approving in part and disapproving in part all
26 elements of the Infrastructure SIP submittal for Tennessee except as it pertains to the
27 requirements of 42 U.S.C. §7410(a)(2)(C) and (J) (2010) within 12 months of its completeness
28

1 finding on these provisions of Tennessee's submittal which is by April 28, 2009. 42 U.S.C. §
2 7410(k)(2) (2010). EPA has failed to do so, in violation of its mandatory duty.

3 **Washington D.C.**

4
5 61. EPA has failed to take final action on provisions of the 1997 8-hour ozone
6 Infrastructure SIP submittal for Washington, D.C.

7 62. On March 27, 2008, EPA found that Washington, D.C. "failed to submit a [State
8 Implementation Plan] addressing [42 U.S.C. §7410(a)(2)(B),(E)(i),(F),(H) and (J) (2010)]." 73
9 Fed. Reg. at 16208. The effective date of this finding was April 28, 2008. *Id.*

10
11 63. Washington, D.C.'s submittal addressing the requirements of 42 U.S.C. §7410
12 (a)(2)(A),(G),(K),(L) and (M) (2010) was deemed complete as of April 28, 2008.

13 64. Pursuant to 42 U.S.C. § 7410(k)(2) (2010), EPA was required to take final action
14 by approving in full, disapproving in full, or approving in part and disapproving in part all
15 elements of Washington, D.C.'s submittal except 42 U.S.C. §7410(a)(2)(B),(E)(i),(F),(H) and (J)
16 (2010) within 12 months of its completeness finding on these provisions of Washington, D.C.'s
17 1997 8-hour ozone Infrastructure submittal which is by April 28, 2009. 42 U.S.C. § 7410(k)(2)
18 (2010). EPA has failed to do so, in violation of its mandatory duty.

19
20 65. On January 11, 2008, Washington, D.C. made another submittal addressing the
21 requirements of 42 U.S.C. §§ 7410(a)(2)(B),(E)(i),(F),(H) and (J) (2010) which was deemed
22 administratively complete by operation of law pursuant to 42 U.S.C. § 7410(k)(1)(B) (2010) on
23 July 11, 2008.

24
25 66. Pursuant to 42 U.S.C. § 7410(k)(2) (2010), EPA was required to take final action
26 by approving in full, disapproving in full, or approving in part and disapproving in part these
27 provisions of Washington, D.C.'s submittal within 12 months of its completeness finding on this
28

1 part of Washington, D.C.'s 1997 8-hour ozone Infrastructure submittal by July 11, 2009. 42
2 U.S.C. § 7410(k)(2) (2010). EPA has failed to do so, in violation of its mandatory duty.

3 67. Although, EPA has since proposed to approve Washington, D.C.'s 1997 8-hour
4 ozone Infrastructure SIP submittals, the approval is not yet final. As of the date of this
5 Complaint, EPA continues to be in violation of its mandatory duty to take final action on the
6 submittals.
7

8 **West Virginia:**

9 68. EPA has failed to take final action on provisions of the 1997 8-hour ozone
10 Infrastructure SIP submittal for West Virginia.
11

12 69. On March 27, 2008, EPA found that West Virginia "failed to submit a [State
13 Implementation Plan] addressing [42 U.S.C. §7410(a)(2)(B),(E)(i),(G),(H),(J) and (M) (2010)]"
14 as well as their part C Prevention of Significant Deterioration permit program required by the
15 November 29, 2005 final rule making NOx a precursor for ozone. 73 Fed. Reg. 16205, 16208
16 (March 27, 2008). The effective date of this finding was April 28, 2008. *Id.*
17

18 70. West Virginia's submittal addressing the requirements of 42 U.S.C. §7410
19 (a)(2)(A),(F),(K) and (L) (2010) was deemed complete as of April 28, 2008. 73 Fed. Reg. at
20 16208 (the elements for which EPA did not find a failure to submit are deemed complete under
21 42 U.S.C. §7410(k)(1)(B) (2010)).
22

23 71. Pursuant to 42 U.S.C. § 7410(k)(2), EPA was required to take final action by
24 approving in full, disapproving in full, or approving in part and disapproving in part the elements
25 of West Virginia's submittal within 12 months of its completeness finding on these provisions of
26 West Virginia's submittal which is by April 28, 2009. 42 U.S.C. § 7410(k)(2) (2010). EPA has
27 failed to do so, in violation of its mandatory duty.
28

72. On May 21, 2008, West Virginia made another submittal addressing the requirements of 42 U.S.C. §§ 7410(a)(2)(B), (E)(i),(G),(H),(J) and (M) (2010) which was deemed complete no later than November 21, 2008.

73. Pursuant to 42 U.S.C. § 7410(k)(2) (2010), EPA was required to take final action by approving in full, disapproving in full, or approving in part and disapproving in part these provisions of West Virginia's submittal within 12 months of its completeness finding on this part of West Virginia's 1997 8-hour ozone Infrastructure submittal which is by November 21, 2009. 42 U.S.C. § 7410(k)(2) (2010). EPA has failed to do so, in violation of its mandatory duty.

74. Although EPA has since proposed to approve West Virginia's 1997 8-hour ozone Infrastructure SIP submittals, the approval is not yet final. As of the date of this Complaint, EPA continues to be in violation of its mandatory duty to take final action on the submittals.

FIRST CLAIM FOR RELIEF

FAILURE TO PERFORM A NON-DISCRETIONARY DUTY TO PROMULGATE FEDERAL IMPLEMENTATION PLANS (CAA 42 U.S.C. § 7410(c)(1))

75. Each allegation set forth in the Complaint is incorporated herein by reference.

76. EPA has a mandatory duty to promulgate a Federal Implementation Plan within two years after EPA determines that a state has failed to submit a complete SIP. 42 U.S.C. § 7410(c)(1) (2010).

77. EPA failed to promulgate Federal Implementation Plans for 1997 8-hour ozone Infrastructure NAAQS for North Dakota, Hawaii, Guam, American Samoa, Northern Mariana Islands, Alaska, Idaho, Oregon and Washington after determining more than two years ago that these states failed to submit a complete Infrastructure SIP for the 1997 8-hour ozone NAAQS.

78. EPA failed to promulgate Federal Implementation Plans to address certain elements identified above of the Infrastructure SIPs for the 1997 8-hour ozone NAAQS for Maryland, Virginia, Arkansas, New Mexico, Oklahoma, Arizona, Florida and Georgia after determining, more than two years ago, that these states failed to submit portions of the Infrastructure SIP for the 1997 8-hour ozone NAAQS.

79. EPA has violated and remains in violation of its non-discretionary duty to promulgate Federal Implementation Plans for all or part of the states identified above.

SECOND CLAIM FOR RELIEF

FAILURE TO PERFORM A NON-DISCRETIONARY DUTY TO ACT TO TAKE FINAL ACTION UNDER 42 U.S.C. §7410(k)(2) ON STATE IMPLEMENTATION PLAN SUBMITTALS

80. Each allegation set forth in the complaint is incorporated herein by reference.

81. Pursuant to 42 U.S.C. §7410(k)(2) (2010), EPA has a mandatory duty to take final action on a SIP submittal that has been deemed complete (either by operation of law or a completeness finding by EPA), within 12 months by approving it in full, disapproving it in full or approving part of it and disapproving part of it.

82. EPA has failed to take final action (and publish notice of that action) within 12 months of its completeness findings on Infrastructure SIP submittals or portions of Infrastructure SIP submittals for the 1997 8-hour ozone NAAQS for Maryland, Virginia, Delaware, Arkansas, New Mexico, Oklahoma, Florida, Georgia, Texas, Nevada, North Carolina, Tennessee, Washington, D.C. and West Virginia.

83. EPA has violated and continues to violate CAA §110(k)(2), 42 U.S.C. §7410(k)(2) (2010).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

[A] DECLARE

[1] That Defendant's failure to promulgate Federal Implementation Plans for 1997 8-hour ozone Infrastructure NAAQS for North Dakota, Hawaii, Guam, American Samoa, Northern Mariana Islands, Alaska, Idaho, Oregon and Washington after determining more than two years ago that these states failed to submit a complete Infrastructure SIP for the 1997 8-hour ozone NAAQS constitutes a failure to perform an act or duty that is not discretionary for Defendant as required by 42 U.S.C. § 7410(c)(1) (2010);

[2] That Defendant's failure to promulgate Federal Implementation Plans to address certain elements of the 1997 8-hour ozone Infrastructure NAAQS for Maryland, Virginia, Arkansas, New Mexico, Oklahoma, Arizona, Florida and Georgia, after determining more than two years ago that these states failed to submit portions of an Infrastructure SIP for the 1997 8-hour ozone NAAQS constitutes a failure to perform an act or duty that is not discretionary for Defendant as required by 42 U.S.C. § 7410(c)(1) (2010);

[3] That Defendant's failure to take final action on all or portions of the Infrastructure SIP submittals for 1997 8-hour ozone NAAQS for Maryland, Virginia, Delaware, Arkansas, New Mexico, Oklahoma, Florida, Georgia, Texas, Nevada, North Carolina, Tennessee, Washington, D.C. and West Virginia within 12 months after EPA made a completeness finding for these submittals constitutes

1 a failure to perform an act or duty that is not discretionary for Defendant as
2 required by 42 U.S.C. §7410(k)(2) (2010);

3 [B] ORDER
4

5 [1] Defendant to promulgate Infrastructure Federal Implementation Plans for
6 1997 8-hour ozone NAAQS for North Dakota, Hawaii, Guam, American Samoa,
7 Northern Mariana Islands, Alaska, Idaho, Oregon and Washington;

8 [2] Defendant to promulgate Infrastructure Federal Implementation Plans to
9 address provisions of the 1997 8-hour ozone NAAQS for Maryland, Virginia,
10 Arkansas, New Mexico, Oklahoma, Arizona, Florida and Georgia;


11 [3] Defendant to take final action on all or portions of the Infrastructure SIP
12 submittals for the 1997 8-hour ozone NAAQS for Maryland, Virginia, Delaware,
13 Arkansas, New Mexico, Oklahoma, Florida, Georgia, Texas, Nevada, North
14 Carolina, Tennessee, Washington, D.C. and West Virginia;

15 [C] RETAIN jurisdiction of this action to ensure compliance with the Court's Order;

16 [D] AWARD Plaintiffs the costs of litigation, including reasonable attorneys' fees and
17 costs; and

18 [E] GRANT such other relief as the Court deems just and proper.
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20 Respectfully submitted this 9th day of September, 2010
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24 Kristin Henry (State Bar No. 220908)
25 Sierra Club Environmental Law Program
26 85 Second Street, Second Floor
27 San Francisco, CA 94105
28 (415) 977-5716
(415) 977-5793 FAX
kristin.henry@sierraclub.org